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No. 91-712

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,
Petitioner,

vs.

HUMBERTO ALVAREZ-MACHAIN,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal courts may try a Mexican national kidnapped by agents of the Drug Enforcement Administration in violation of the Extradition Treaty between the United States and Mexico after the Government of Mexico has made unequivocal and repeated protests and a formal demand for his repatriation.

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No. 91-712

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1991

UNITED STATES OF AMERICA,
Petitioner

vs.

HUMBERTO ALVAREZ-MACHAIN,
Respondent

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Humberto Alvarez-Machain submits this brief in opposition to the Petition for a Writ of Certiorari filed by the United States in this case.

STATEMENT

Respondent Dr. Humberto Alvarez-Machain is a medical doctor who resides in Guadalajara, Mexico. In April 1990 he was kidnapped by agents of the U.S. Drug Enforcement Agency (DEA) in his medical office and forcibly transported to Texas where he was taken into custody by waiting DEA officials.[1] The Government has not challenged the district court's findings of DEA responsibility for Respondent's abduction.

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[1] Respondent claimed that he was subjected to "shocking" and "outrageous" treatment justifying the denial of personal jurisdiction under United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974). The Ninth Circuit did not reach this issue.

Similarly, the Ninth Circuit did not reach Respondent's contention that the repatriation order was supported by the Court's supervisory power.

In a diplomatic note dated May 16, 1990, the Government of Mexico stated that Respondent had been abducted "in violation of the procedure established in the extradition treaty between the two countries." App., 13a.[2] The May 16, 1990, note further requested Respondent's repatriation to Mexico. Id.

In the Ninth Circuit the Mexican Government reiterated this unequivocal position by submitting a letter to the court in which it protested the violation of the Extradition Treaty and supported Respondent's reliance on the

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[2] "App." refers to the Appendix to the Government's Petition. "Resp. App." refers to the Appendix to this brief. "Verdugo App." refers to the Appendix to the Government's Petition in United States v. Verdugo-Urquidez, No. 91-670.

Treaty in the courts.[3] The Government of Mexico has never wavered from this position.

In addition, the Government of Mexico has stated that it is fully prepared to fulfill its obligations under the Extradition Treaty after Respondent is repatriated. Resp. App., 6a. Under Article 1 of the Extraditon Treaty, if a request for respondent's extradition was made, the Government of Mexico must either extradite Respondent or submit the case for prosecution in Mexico. Verdugo App. 70a.[4]

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[3] The text of the affidavit submitted in the Ninth Circuit by the Mexican Consul in Los Angeles is included in the Appendix to this brief.

[4] Petitioner claims that there is "no reason to believe" that Mexico will extradite Respondent under the treaty. Petition, at 10 n. 7. However, there is

REASONS FOR DENYING THE WRIT

I

THE COURTS BELOW CORRECTLY FOUND THAT THE EXTRADITION TREATY BETWEEN THE UNITED STATES AND MEXICO BARS THE TRANSBORDER ABDUCTION OF MEXICAN NATIONALS BY U.S. AGENTS WITHOUT THE ACQUIESCENCE OR CONSENT OF THE GOVERNMENT OF MEXICO

In its Petition for Certiorari the Government makes the extraordinary claim that it may violate with impunity the Extradition Treaty between the United States and Mexico, May 4, 1978, 31 U.S.T. 5059, T.I.A.S. No. 9656 ("Extradition Treaty"), by kidnapping

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no evidence in the record of this case concerning the number of extradition requests the United States has made concerning Mexican nationals or the results of such requests. The United States has never requested Respondent's extradition; nor have they sought his prosecution in Mexican courts.

Mexican nationals from Mexican territory over the formal protest of the Mexican government. This claim has never been accepted by any court and the unprecedented nature of the Government's claim alone cannot justify review by this Court.

In contrast, the Ninth Circuit's judgment in this case is solidly rooted in this Court's precedents, see, e.g., United States v. Rauscher, 119 U.S. 407 (1886), and in the clear language and manifest purpose and intent of the Extradition Treaty between the United States and Mexico. Moreover, because this Court should not lightly assume that our Government will kidnap persons in violation of extradition treaties and over the protests of their governments,

the unique factual context of this case makes it an inappropriate candidate for plenary review in this Court.

A. The Ninth Circuit's Decision is Completely In Accord With This Court's Precedents

The outcome of this case derives from two uncomplicated propositions: First, that the Extradition Treaty prohibits the kidnapping of a Mexican national on Mexican territory by United States agents; second, that treaty violations can limit or affect the jurisdiction of United States courts.

The Extradition Treaty between the United States and Mexico explicitly provides in Article 9 that neither government "shall be bound to deliver up

its own nationals," though the extradition of nationals is contemplated as a possibility, and though each nation is compelled to prosecute those nationals it chooses not to extradite. This provision does more than merely suggest that the Treaty prohibits abduction of the other country's nationals; it makes it abundantly clear.

Indeed, a prohibition on transborder abductions is implicit in the "manifest scope and object of the treaty itself." United States v. Rauscher, 119 U.S. at 422. See also, Ford v. United States, 273 U.S. 593 (1927); Cook v. United States, 288 U.S. 102 (1933).[5]

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[5] The Ninth Circuit also had before it extensive information about the history of extradition treaties and

Based on the Treaty's language, therefore, the courts below came to the unexceptional conclusion that the unconsented to kidnapping of Dr. Alvarez-Machain by United States agents from Mexican territory violated its terms.

Nor was there anything unusual in the conclusion that, as a result of the government's incontrovertible violation of Article 9, United States courts lacked jurisdiction over the kidnapped defendant. This is a straightforward application of this Court's decisions in Rauscher, which recognized the right of an individual to challenge jurisdiction

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diplomatic practice between the United States and Mexico which supported this view of the plain language and structure of the Treaty. See Amicus Curiae brief of Lawyers Committee for Human Rights.

resulting from the breach of an implicit term of an extradition treaty, and in Cook, which held that treaty violations may deprive domestic courts of jurisdiction.[6]

Nothing in these conclusions warrants review by this Court.

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[6] This principle appears self-evident when applied to other provisions in the Treaty reflecting the legal and policy concerns of each government which would clearly be enforced by our courts. For example, Article 8 permits Mexico, which has no death penalty in peacetime, to refuse to extradite a fugitive unless it receives adequate assurances from the United States that the death penalty will not be imposed, or, if imposed, executed. Surely, were a Mexican national extradited to the United States, following such assurances, he could not thereafter be executed in violation of the Treaty. The exact same principle is at play in this case.

B. This Case Does Not Warrant Supreme Court Review Because It Presents a Unique Set of Factual and Legal Issues and Creates No Conflict Among Circuits.

This case does not warrant Supreme Court review, not only because it is a direct application of the Court's well-established precedents, but also because it involves unique circumstances. This case and the pending Verdugo-Urquidez case (No. 91-670), are the only reported cases in which a criminal defendant has been abducted by agents of the United States government over the objection of a foreign government and in plain violation of an existing extradition treaty.

Conversely, in every reported

decision involving an international abduction, beginning with Ker v. Illinois, 119 U.S. 436 (1886), there was either consent[7] or acquiescence[8] by the foreign government, the absence of an extradition treaty,[9] or the absence of any U.S. government involvement in the abduction.[10] Indeed, in Ker v. Illinois

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[7] See, e.g., United States v. Cordero, 668 F.2d 32, 37-38 (1st Cir. 1981); United States v. Valot, 625 F.2d 308, 310 (9th Cir. 1980).

[8] See, e.g., Matta-Ballesteros v. Henman, 896 F.2d 255, 259-60 (7th Cir. 1990).

[9] See, e.g., United States v. Cotten, 471 F.2d 744 (9th Cir.), cert. denied, 411 U.S. 936 (1973).

[10] See, e.g., United States v. Lovato, 520 F.2d 1270, 1272 (9th Cir.), cert. denied, 423 U.S. 985 (1975) ("Lovato's ... allegations amount to little more than the scenario of a routine expulsion by Mexican officers of an undesirable alien.")

itself there was no United States government involvement and there was no protest from the government of Peru.

The unique facts of this case explain why there is no conflict among the Circuits on this question. For the same reason, the decisions below will have no effect on the ordinary application of the principles in the line of cases originating in Ker v. Illinois, 119 U.S. 436 (1886), and Frisbie v. Collins, 342 U.S. 519 (1952).

Fairly read, the decisions below are legally confined and factually specific. Contrary to the government's broad assertions, nothing in the Ninth Circuit's opinion defeats, or even casts doubt on, the ability of American courts to assert jurisdiction over foreign

defendants in circumstances where their abduction is not the responsibility of agents of the U.S. government, where there is no extradition treaty between the United States and the country where an abduction takes place,[11] or where a foreign government with which we have an extradition treaty consents to or acquiesces in the abduction or informal rendition of persons within its territory.[12] Thus, the Ker-Frisbie

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[11] This category includes Libya, Syria, Iran, Lebanon, Jordan, Yemen, Tunisia, Algeria, North Korea, the Peoples Republic of China, Viet Nam, Afghanistan, Kampuchea, Kuwait, Morocco, Ethiopia, Somalia, Sudan, and Mozambique.

[12] There are many examples of such informal renditions between the United States and Mexico. One of the most recent and sensational examples is the 1989 return of Mexican national Ramon Salcido to face capital charges of murdering his wife and children in

doctrine remains undisturbed.

In addition, this case does not involve the authority of the Executive Branch to engage in international abductions in violation of customary international law. Nor does this case affect the President's power to abrogate the obligations this country has assumed in this or any other extradition treaty. Rather, this case involves an existing treaty which has not been abrogated and which specifically restricts the circumstances in which the nationals of each country may be extradited.[13]

Thus, this case presents none of

California.

[13] Under Article 23(4) of the Treaty the United States may terminate the Treaty on six months notice. Verdugo App., 83a.

the apocalyptic issues suggested in the Government's Petition. Only if our government intends to engage routinely in the kind of snatch and grab abduction that occurred in this case, in clear violation of existing extradition treaties and over the protests of our treaty partners, will the decisions below stand in the way. There is no reason to believe that the government of the United States has adopted a policy so antithetical to a world order based on respect for the basic principles of international law and the territorial integrity of states.

II

IF THE COURT DECIDES TO GRANT THE PETITION IN UNITED STATES v. VERDUGO-URQUIDEZ IT SHOULD CONSOLIDATE THIS CASE FOR ARGUMENT AND DECISION

If this Court decides to reach the issues raised by the decisions below in United States v. Verdugo-Urquidez, No. 91-670, and this case, Respondent urges the Court to consider these issues by granting the Petition in this case or by granting the Petitions in both cases.

This case presents none of the factual uncertainties raised in Verdugo. The Government has conceded responsibility for Respondent's abduction. The Government of Mexico has, from the time of Respondent's abduction to the present, unequivocally protested the abduction as a violation

of the Extraditon Treaty, demanded Respondent's repatriation to Mexico and supported his efforts to raise the Extradition Treaty as a defense to the personal jurisdiction of U.S. courts to try Respondent. In short, the factual questions that led the Ninth Circuit to remand Verdugo for further proceedings are not presented in this case.

CONCLUSION

For the foregoing reasons, the Petition For a Writ of Certiorari should be denied. In the alternative, if this Court decides to hear argument on these issues, the Petition in this case should be granted. If the Petition in United

States v. Verdugo-Urquidez, No. 91-670, is granted, this case should be consolidated with Verdugo for argument and decision.

Dated: November 21, 1991.

Respectfully submitted,

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APPENDIX

Secretaría
De
Relaciones Exteriores

NOVEMBER 9, 1990.

Consulado General

TO THE HONORABLE JUSTICES OF THE NINTH CIRCUIT COURT OF APPEALS

RE: United States vs.
Humberto Alvarez
Machain No. 90-50459

I, JOSE ANGEL PESCADOR OSUNA, accredited at the United States Department of State as Consul General of the United Mexican States in Los Angeles, California, following the instructions of my government and in the exercise of my consular functions as provided by the 1963 Vienna Convention of Consular Relations, to which both Mexico and the United States are parties, wish to communicate to this honorable court the position of the Government of Mexico regarding the above referenced case which involves a mexican national.

In so doing, nothing in this communication or its submission shall be construed, in any way, as a waiver of the sovereign immunity which Mexico and its Consulate General enjoy in accordance with international law, nor as a submission to the jurisdiction of this Honorable Court.

In reference to this case, this communication takes into account the facts established in and adopted by the United States District Court for the Central District of California, and contained in the record before this Honorable Court.

The position of the Government of Mexico is as follows:

1.- The Government of Mexico concurs with part of the ruling of the United States District Court for the Central District of California, as stated below.

2.- A violation has been committed to the Extradition Treaty in force between the two countries (henceforth "The Treaty"), and to the General Principles of International Law.

3.- Mexico expressed its official attitude to this violation as established in the record of the district Court, via diplomatic notes to the State Department of the United States, and sought the return to Mexico of DR. HUMBERTO ALVAREZ MACHAIN.

4.- Since under the Treaty the United States had the right to request the extradition of DR. ALVAREZ MACHAIN, the Treaty was applicable to DR. ALVAREZ MACHAIN.

5.- The Treaty recognizes certain rights possessed by individuals to whom

the Treaty's provisions apply.

6.- Individuals have often gone to court to ensure observance of the rights they derive from this Treaty.

7.- It is from the Treaty itself, as well as from the official diplomatic attitude taken by Mexico to its violation in this case, that DR. ALVAREZ MACHAIN can oppose the violation to his detriment of the treaty and to the jurisdiction asserted over his person in the United States after his abduction from Mexico.

8.- The Treaty constitutes the exclusive and sole means by which the Government of the United States can seek to bring a Mexican National present in Mexico to justice. Mexican legislation in force and effect makes it illegal for Mexican Government authorities to exclude a Mexican national from Mexican territory, or for Mexican Government authorities to deport a Mexican national from Mexican territory. Therefore Mexican Government authorities have not entered, and could not enter, into any special arrangement or agreement, either with the United States or with any other country, to surrender its own nationals.

In the case of extradition treaties to which Mexico is a party, the Government of Mexico has invariably and expressly reserved to the parties the right to refuse the requested

extradition to one of their own respective nationals, agreeing instead to prosecute them in their own national courts, in the interest of justice.

9.- The purpose and object of the Treaty, was from its inception, precisely to provide the legal framework, with which one of the parties could request of the other the extradition of persons from the territory of the former to the territory of the latter. The Treaty is binding on its parties, but serves no purpose if the parties are free to ignore its terms.

10.- The only legal means by which the United States could have pursued the prosecution of DR. HUMBERTO ALVAREZ MACHAIN, a Mexican national, was through the specific provision of the Treaty, which was negotiated, agreed upon and ratified precisely to deal, with the extradition of nationals. Article 9 its paragraph 1 that "neither contracting party shall be bound to deliver up its own nationals, but the executive of the requested party shall, if not prevented by the laws of the party, have the power to deliver them up if, in its discretion, it be deemed proper to do so". Paragraph 2, on the other hand, provides that "if extradition is not granted pursuant to paragraph 1 of this article, the requested party shall submit the case to its competent authorities for the purpose of

prosecution, provided that party has jurisdiction over the offense".

11.- The judiciary of each of the parties to the Treaty is given, through several of the Treaty's provisions, ample participation in any extradition proceeding. Therefore, the pronouncements of a nation court of one of the parties, in a case where the only legal means for bringing an individual to justice was to invoke the Extradition Treaty, in no way may be construed as an interference with the authority of the Executive branch for the conduct of Foreign Affairs.

12.- Not affirming the district court's holding in this case, would emasculate the Extradition Treaty for all practical and future effects. As governmental operations of this nature would receive implicit approval, and since abductions of Mexican suspects in the sovereign territory of Mexico would result in a legitimized assertion of personal jurisdiction, some United States authorities would find it easier not to resort to the binding terms of the Treaty.

13.- Moreover, not affirming the district court's holding in this case, would mean that a case such as the one at hand would be repeated, with all the negative diplomatic and legal consequences which have derived from it, to the detriment of the friendly

relations that should always prevail between the two countries including in law enforcement and administration of justice matters, and which relationship should be maintained within the bounds of international law.

14.- The Mexican Government does not and will not limit itself to the mere reiteration of the criteria and principles stated above. The Mexican Government is in a position to insist that there is and always was an alternative means by which the interest of justice, so that crimes do not go unpunished. The Government of Mexico maintains that, in this case, justice can be administered, but that it has to be administered legally and in conformity with the requirements forth in the Extradition Treaty.

15.- The Mexican Government is consequently prepared to put into motion the administration of justice, as soon as the Government of the United States, in compliance with article 9 of the Treaty, provides it with the necessary elements, as required by the Treaty, to enable it to comply in its turn with its treaty obligation to prosecute.

Respectfully,

JOSE ANGEL PESCADOR OSUNA
CONSUL GENERAL OF MEXICO
LOS ANGELES